11-18-1991

Fourth Prize: Hill v. N.C.A.A.

Julie Reagin

Curt Holbreich

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JENNIFER HILL et al.,	)
Plaintiffs and Respondents,	)
v.	)
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,	)
Defendant and Petitioner.	)

PETITIONER'S BRIEF ON THE MERITS

On Appeal From the Judgment of the Superior Court
of the State of California, County of Santa Clara
The Honorable Conrad L. Rushing, Judge

Review of the Decision of the Court of Appeal,
Sixth District

Round #1: 6:00 p.m.
November 18, 1991

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QUESTION PRESENTED

Can the National Collegiate Athletic Association properly ask students who voluntarily participate in its sporting events to submit to drug tests to ensure that the athletic competitions it sponsors are conducted in as safe, healthful, and fair environment as possible?

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STATEMENT OF THE CASE

Preliminary Statement

On January 6, 1987, plaintiff Simone LeVant filed a complaint for declaratory and injunctive relief against the National Collegiate Athletic Association ("NCAA") in Santa Clara Superior Court. (2 C.T. 1) The action sought to enjoin the NCAA from prohibiting LeVant's participation in NCAA competitions based upon her refusal to comply with its mandatory drug testing program. (2 C.T. 2, 16) A preliminary injunction was granted on March 13, 1987, prohibiting the NCAA from preventing LeVant's participation in intercollegiate diving competition and from enforcing its drug testing program against her. (2 C.T. 19-22) The preliminary injunction was dissolved on May 11, 1987, by stipulation of the parties when LeVant graduated from Stanford University and was no longer eligible for NCAA competition. Hill

v. National Collegiate Athletic Ass'n., 223 Cal. App. 3d 1642, 1649 n.4 (1990).

The respondents, Jennifer Hill and J. Barry McKeever, were added as plaintiffs by amended complaints filed in February and July, 1987. Id. On July 20, 1987, Stanford University was granted leave to intervene on behalf of respondents. (2 C.T. 25)

The court issued a temporary restraining order on August 26, 1987, prohibiting the NCAA from enforcing the provisions of its drug testing program against all Stanford teams and athletes. (2 C.T. 26-28) On December 18, 1987, the court issued a preliminary injunction prohibiting the NCAA from enforcing its drug testing program against Stanford or its students except in the sports of football and men's basketball. (2 C.T. 78-82) After a trial in February and March, 1988, Judge Conrad L. Rushing, sitting without a jury, permanently enjoined the NCAA from enforcing the provisions of its drug testing program against Stanford and its students, including those in football and men's basketball. Hill, 223 Cal App. 3d at 1649 n.4. The court found that the program violated the California constitutional right of privacy because the NCAA failed to show a compelling need for its drug testing program. Id. at 1651. The Court of Appeal for the Sixth District affirmed. Id. at 1647. This Court granted petition for review on December 20, 1990.

Statement of Facts

The petitioner, the National Collegiate Athletic Association, is an unincorporated association of more than 1,000 colleges, universities, and conferences of which Stanford University is a member. Hill v. National Collegiate Athletic

Ass'n., 223 Cal. App. 3d 1642, 1648 (1990). It is the primary body governing intercollegiate sports in America. Id.

By a vote of its membership at its 1986 annual convention, the NCAA established a drug testing program for those participating in NCAA championships and NCAA-certified postseason football bowl games. (1 C.T. 19) Tests are not conducted before or during the regular season. (1 C.T. 31)

The program was approved after several years of study by the NCAA that included a report issued by a special drug testing committee setting forth a detailed proposal for a drug testing program (2 C.T. 92-104) and a Michigan State University study commissioned by the NCAA to investigate the extent of drug use by college athletes. (2 C.T. 105-26)

The NCAA decided to study this problem following a drug scandal that rocked the 1983 Pan American Games. (1 R.T. 7:26-11:16) After athletes from another country tested positive for drugs, about fifteen United States athletes hurriedly left the Games before their competitions were held. (1 R.T. 8:13-20) Some of them were enrolled at NCAA schools. (1 R.T. 8:21-25)

The purpose of the program is to provide clean, equitable competition (1 C.T. 19) and to protect the health and safety of participating student-athletes. (2 C.T. 129) The list of prohibited substances includes those generally purported to be performance enhancing and/or potentially harmful to the health and safety of the student-athletes. (2 C.T. 129) The prohibited substances are divided into six categories, including one for street drugs, such as cocaine and heroin, another that includes anabolic steroids, and one that covers sympathomimetic amines,

some of which are contained in over-the-counter cold and diet medications. (2 C.T. 132-33) Although medical experts disagree on the performance enhancing effect of many of these drugs, testimony from witnesses on both sides confirms that there is a perception among athletes that some of these drugs, such as steroids, enhance athletic performance. (Supp. R.T. 2) The testimony was also undisputed that the use of drugs such as amphetamines, cocaine, and steroids can seriously harm the health of student-athletes and can cause permanent physiological damage. (Supp. R.T. 1)

The NCAA testing procedure is modeled after those used by the United States and International Olympic committees. (1 R.T. 12:6-9) It includes elaborate protocols designed to protect the confidentiality of test subjects and results. (2 C.T. 133-37) All students competing in NCAA-sponsored sports are required to sign a consent form agreeing to participate in the drug testing program or be ruled ineligible. (2 C.T. 129) The consent form is contained in a booklet that includes detailed program procedures, a list of the prohibited substances, and penalties for failure to conform with program rules. (2 C.T. 127-137)

Students are selected for testing based upon position of finish in competition, playing time, random selection, or upon suspicion. (2 C.T. 134) Students selected for testing are required to complete a form indicating drug use, including over-the-counter drugs and prescription medication. (2 C.T. 134) If the declaration is consistent with the results of a urine test, a student who tests positive will not necessarily be ruled ineligible. (2 C.T. 134) Exceptions also may be made for

students who have a documented medical need for certain prohibited drugs. (2 C.T. 130) Students must report for testing within an hour after completion of their competition. (2 C.T. 134) NCAA personnel monitor the process from the time an athlete is informed he or she has been selected to produce a urine sample to ensure the integrity of the process. (2 C.T. 135) Once a student-athlete provides an adequate sample, he or she divides it into two bottles marked "A" and "B," the bottles are sealed and an secret code number specific to that student-athlete is attached. (2 C.T. 135) The student then signs a form attesting that there were no irregularities in the procedure. (2 C.T. 135)

The specimens are shipped to an NCAA-certified laboratory, where they are tested by the gas chromatography/mass spectrometry method. (2 C.T. 133) These labs are subject to periodic quality control checks. (2 C.T. 134) At the lab, the "A" sample is tested. If the "A" sample is positive for any prohibited substance, the NCAA is notified and informed of any declaration made by the student-athlete on his or her form. (2 C.T. 136) No athlete can be suspended until his or her school is notified of the result and the "B" sample is tested. If the "B" sample confirms the results of the "A" sample test, the athlete is subject to disciplinary action. (2 C.T. 136) First offense includes ineligibility from postseason competition for ninety days. (2 C.T. 131) If an athlete tests positive for a second time after serving a ninety-day suspension, the penalty is loss of post-season eligibility in all sports for the current and following academic year. (2 C.T. 131)

Of the 3,511 athletes tested in the initial year of testing

during the 1986-87 season, thirty-four were declared ineligible, mostly in the sport of football, including two at Stanford. (Supp. R.T. 7) In 1987-88, there were thirty-one positive tests, twenty of them in football. (Supp. R.T. 7)

The respondents, Jennifer Hill and J. Barry McKeever, were athletes at Stanford University. (Supp. R.T. 1) Hill was on the women's soccer team for four years and served as co-captain her senior year. (Supp. R.T. 1) She was tested under the NCAA program. (2 C.T. 45) McKeever was a linebacker on the football team and attended Stanford on an athletic scholarship. (Supp. R.T. 1-2) McKeever signed an NCAA drug testing consent form before the 1986 season. (2 R.T. 381:25-382:1) He was given a urine test by the NCAA at Stanford before the 1986 Gator Bowl. (2 R.T. 382:17-21)

Hill and McKeever objected to the drug testing, in part, because they found the prospect of urinating in the presence of an NCAA monitor objectionable. (Supp. R.T. 2)

SUMMARY OF ARGUMENT

The appellate court erred in requiring that the NCAA, a private, voluntary organization, show a compelling need in order that its drug testing program not violate the privacy provision of the California Constitution. The three-part test the court imposed on the NCAA necessitated that it show: (1) the purpose of the drug testing program relates to its regulatory goals of preserving the health of athletes and the integrity of its athletic competition; (2) there is a compelling need for the drug testing program; and (3) there are no less offensive, viable alternatives to the drug testing program. This test, which is

known as the Bagley test, was created to curtail government intrusion into privacy interests. Bagley v. Washington Township Hospital Dist., 65 Cal. 2d 499, 505 (1966). Nothing in Bagley or its progeny state that this test of strict scrutiny was intended to apply to private, voluntary organizations such as the NCAA.

Private, voluntary organizations are significantly different from state actors. Their actions do not require nor should they be subjected to the strict scrutiny required of government or those acting under the color of law.

Courts, including this one, have recognized that a "compelling need" test need not be met in all circumstances in which the privacy right is implicated. When danger to health is in issue, justification for the invasion of privacy is measured by showing that a rational basis for the action exists. Courts have also determined whether privacy rights have been violated by balancing the individual's right to privacy against the state interest involved.

Because the NCAA drug testing program is based substantially on health concerns, the rational basis standard would be a proper test for this Court to apply. Moreover, as the policy behind its drug testing is reasonably related to achieving its health and safety goals, the NCAA meets this standard.

Alternatively, the Court should adopt the balancing test widely used by this and other courts in privacy cases. Because privacy expectations are diminished in the context of athletics, the NCAA drug testing program constitutes a "minimal intrusion" into the privacy rights of college athletes. It is, therefore, apparent that the NCAA has met the balancing test by showing that

the interest of any individual student in voluntarily participating in intercollegiate competition does not outweigh the NCAA's substantial interest in protecting the health and safety of student-athletes and the integrity of competition through its drug testing program.

Even if the stringent Bagley test applies, the appellate court erred in its application because the NCAA met its burden of proof at trial. A correct reading of the data demonstrates there is substantial drug use among college athletes. Thus, as the drug testing program is related to the NCAA's goals of ensuring the health of athletes and integrity of competition, the first prong of the Bagley test was met. Furthermore, the NCAA program is a necessary and tempered response to the problems of drug abuse in sports and society. In showing this compelling need for its drug testing program, the NCAA met the second prong of the Bagley test. The final prong of the Bagley test was met by the NCAA when ample evidence was presented that there is no less offensive, viable alternative to the drug testing program. The appellate court pointed to drug education as a less offensive alternative. But in doing so, it merely substituted its beliefs for the judgment of a distinguished group of drug education and drug testing experts assembled by the NCAA to implement its drug testing program. Drug testing is the most effective and accurate method for the NCAA to achieve its regulatory goal.

ARGUMENT

I. THE APPELLATE COURT APPLIED TOO STRICT A STANDARD IN EVALUATING THE NCAA'S DRUG TESTING PROGRAM.

A. Introduction

The court erred in holding the NCAA, a private voluntary

organization, to a standard created to restrict government intrusion into the right of privacy.[1] Nothing in the legislative history or the judicial opinions of this or any other court supports a conclusion that private, voluntary organizations must be held to the same strict standard under Article I, Section 1 of the California Constitution that is required of entities whose actions rise to the level of state action.[2]

The appellate court determined that the NCAA had "to show a compelling interest" to justify its drug testing program. Hill v. National Collegiate Athletic Ass'n., 223 Cal. App. 3d 1642, 1656 (1990). It outlined a three-part test the NCAA was required to satisfy to meet its burden of demonstrating a compelling need. The test required the NCAA show "that: (1) the testing program relates to the purposes of the NCAA regulations which confer the benefit (participation in intercollegiate competition); (2) the utility of imposing the program manifestly outweighs any resulting impairment of the constitutional right; and (3) there are no less offensive alternatives." Id. at 1656-57 (citations omitted). The appellate court concluded the NCAA failed to meet

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[1] Because of the important precedential constitutional issues in this case, the standard of review is de novo. "'When, as here, the application of law to fact requires us to make value judgments about the law and its policy underpinnings, and when, as here, the application of law to fact is of clear precedential importance, the policy reasons for de novo review are satisfied and we should not hesitate to review the [trial] judge's determination independently.'" People v. Louis, 42 Cal. 3d 969, 988 (1986) (quoting U.S. v. McConney, 728 F.2d 1195, 1205 (9th Cir. 1984)).

[2] Article I, section 1 provides: "All people are by nature free and independent and have certain inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." Cal. Const. art. 1, § 1, amended 1974.

all three elements of the test and ruled the drug testing program violates the right to privacy. Id. at 1675.

The three-part test used by the appellate court was adopted from one created by this Court 25 years ago for use in significantly different circumstances. In Bagley v. Washington Township Hospital District, 65 Cal. 2d 499, 510-11 (1966) (citations omitted), this Court ruled unconstitutional restraints placed on the political activity of a governmental agency employee. In doing so, the Court created a three-part test that must be met before a "*government* may, when circumstances inexorably so require, impose conditions upon the enjoyment of publicly conferred benefits despite a resulting qualification of constitutional rights." Id. at 505 (emphasis added).

This test, which has since been referred to by the Court as the Bagley test, was developed independently of and prior to the inclusion of the privacy amendment into the California Constitution in 1972. Nothing about its creation or initial application indicates it was intended to or should be used in cases that concern possible restrictions on privacy imposed by private, voluntary organizations such as the NCAA.

Decisions by this Court since the creation of the Bagley test have emphasized its applicability to actions of state and local government. This was particularly true in the Court's clear reformulation and endorsement of the test in Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252 (1981), a case relied upon by the appellate court in imposing the Bagley test on the NCAA. Hill, 223 Cal. App. 3d at 1657. In Myers, the Court spoke of "the *government's* burden of demonstrating the

propriety of the condition or limitation under the *Bagley* test" in striking down as unconstitutional legislative restrictions placed on state funding for abortions. Myers, 29 Cal. 3d at 268 (first emphasis added). *See also* Long Beach City Employees Ass'n. v. City of Long Beach, 41 Cal. 3d 937, 952-53 (1986) (city-required involuntary polygraph tests intrude upon public employee's privacy); Robbins v. Superior Court, 38 Cal. 3d 199, 213 (1985) (permitting preliminary injunction preventing implementation of county welfare plan preventing single and employable residents from receiving cash grants).

This Court has never applied the Bagley test to a private, voluntary organization such as the NCAA. Bagley and the cases that endorse its three-part test do not define any limits on the actions of private, voluntary entities, rather "[t]he premise of such cases is that the *power of government, federal or state,* to withhold certain benefits from its citizens does not encompass the power to bestow such benefits based on an arbitrary deprivation of constitutional rights." Wilkinson v. Times Mirror Corp., 215 Cal. App. 3d 1034, 1050 (1989) (emphasis added) (holding that preemployment drug testing by a private employer does not violate the privacy provision). Courts have historically invoked the Bagley test to check government abuse, not limit private action.

Just as the Bagley test was unsuitable in this case, so was requiring the NCAA show a "compelling need" for the drug testing program. That requirement, like the Bagley test, has its roots in limiting government intrusions into constitutionally protected areas of privacy. The one federal and one state case cited by

the appellate court in imposing this standard on the NCAA concern infringements on privacy by government. Hill, 223 Cal. App. 3d at 1656. The cases, Griswold v. Connecticut, 381 U.S. 479, 497 (1965) (striking down Connecticut law regulating birth control information provided by a private health clinic), and City of Carmel-by-the-Sea v. Young, 2 Cal. 3d 259, 268 (1970) (holding unconstitutional state financial disclosure law for public officials), are silent as to the standard that should be imposed on a private, voluntary organization such as the NCAA.

Nothing in Bagley, Young or their progeny state the requirement of strict scrutiny was intended to apply to the situation before the Court. Private, voluntary organizations are significantly different from state actors and therefore their actions do not require nor should they be subjected to the strict scrutiny required of government or those acting under the color of law.

B. In rotely applying the Bagley test the appellate court ignored the important difference between the strict rules necessary to govern state action and the more limited role the state plays in controlling the membership of a private, voluntary organization.

Recent federal court decisions are in accord that the NCAA is a private entity whose conduct does not rise to the level of state action. *See, e.g.*, O'Halloran v. University of Washington, 679 F. Supp. 997, 1002 (W.D. Wash. 1988), rev'd on other grounds, 856 F.2d 1375 (9th Cir. 1988), and cases cited therein. Indeed, even the United States Supreme Court has held that NCAA regulatory functions do not constitute state action, even when a member state university enforces the NCAA regulation. National Collegiate Athletic Ass'n. v. Tarkanian, 488 U.S. 179, 196

(1988).

No one is compelled to join the NCAA; its actions do not carry the force of law. The NCAA has "no government powers to facilitate its investigation." Id. at 197. It has "no power to subpoena witnesses, to impose contempt sanctions, or to assert sovereign authority over any individual." Id. Those who join the NCAA voluntarily agree to abide by its regulations. Universities are free to leave the NCAA and conduct their athletic programs without its sanction and rewards. Athletes are free to participate in NCAA-sponsored programs or choose another outlet for their athletic endeavors.

The fact that the alternatives to NCAA competition might be less financially rewarding to the school does not mean there are no other options. "The university's desire to remain a powerhouse among the Nation's college basketball teams is understandable, and nonmembership in the NCAA obviously would thwart that goal. But that UNLV's options were unpalatable does not mean that they were nonexistent." Id. at 198-99 n.19. (rejecting an argument that the University of Nevada, Las Vegas ("UNLV") had no alternative but to join the NCAA and comply with its rules).

Neither was Stanford required to join the NCAA, but once it did, nothing required the respondents to pursue their personal interest in athletics through Stanford teams enrolled in NCAA-sponsored competition. Both individuals were free to pursue their respective interests by other means. But once they voluntarily chose to compete in NCAA events, they were obliged to follow NCAA regulations. Such an arrangement does not and should

not call for the same degree of strict scrutiny necessary to guard against involuntary government intrusions into the privacy area. The Bagley test therefore was inappropriate.

C. Judicial interpretations of the privacy amendment provide no support for measuring the actions of a private, voluntary organization such as the NCAA by the same standard that governs state action.

The California privacy provision is not all inclusive. The Court declared this in its first decision interpreting the privacy amendment when it stated the "amendment does not purport to prohibit all incursion into individual privacy."[3] White v. Davis, 13 Cal. 3d 757, 775 (1975).

The Court reached this conclusion by examining the "'legislative history'" of the amendment as contained in the "election brochure 'argument'" in favor of its passage. It identified four "principle 'mischiefs'" to which the amendment was directed. Id. These "'mischiefs'" were "(1) '*government* snooping' and the secret gathering of personal information; (2) the overbroad collection and retention of unnecessary personal information by government and business interests; (3) the improper use of information properly obtained for a specific purpose . . . (4) the lack of a reasonable check on the accuracy of existing records." Id. (emphasis added).

No reference was made to what, if any, applicability the amendment has to private, voluntary organizations such as the NCAA. In the absence of any legislative history to the contrary,

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[3] The Court in White went on to say "such intervention must be justified by a compelling interest" in finding that police covert surveillance on a state university campus constituted a prima facie violation of the privacy provision. White, 13 Cal. 3d at 775-76. But unlike the present case, White concerned state action.

the appellate court had no reason to conclude the privacy provision was intended to cover the NCAA's drug testing program. Such a narrow reading of the intent of the privacy provision is not without precedent. In People v. Privitera, 23 Cal. 3d 697, 709 (1979), the Court relied on these grounds in ruling the "right of privacy does not encompass a right of access to drugs of unproven efficacy" such as laetrile. "In the absence of any evidence that the voters in amending the California Constitution to create a right of privacy intended to protect conduct of the sort engaged in by defendants, we have no hesitation in holding" this action does not "offend that constitutional provision." Id. at 709-10.

Moreover, this Court has never held that the state constitutional guarantee of privacy applies to private interests, let alone the more limited interests of a private, voluntary organization. As recently as two and one-half years ago, the Court reserved judgment on whether the privacy provision applies at all in cases of a private entity. Schmidt v. Superior Court, 48 Cal. 3d 370, 389 n.14 (1989). In Schmidt, the Court, in upholding a minimum age requirement on mobilehome park residents, declined to say "under what circumstances, *if any*, purely private action by a property owner or landlord would constitute a violation of the state constitutional privacy provision." Id. (emphasis added). The Court has thus implicitly recognized that distinctly different considerations apply in determining whether the acts of private entities impact on the right to privacy.

Lower courts have acknowledged this difference. *"At least some types* of nongovernmental conduct can interfere with the

right granted by the constitutional provision." Semore v. Pool, 217 Cal. App. 3d 1087, 1094 (1990) (emphasis added). *See also* Wilkinson, 215 Cal. App. 3d at 1040. This limiting language is implicit recognition that restrictions on nongovernment action under the privacy clause are not as severe as restrictions on state action. It follows that private entities should not be held to the standard of "compelling need."

Even the appellate court recognized that courts have not always required a showing of "compelling need" in cases impacting on the right to privacy. Hill, 223 Cal. App. 3d at 1656 n.7. It nevertheless chose to ignore this body of law and impose the "compelling need" standard set forth in Bagley. The court justified its action on the ground that the "California courts deciding claims under article 1, section 1, require the *state* to show a compelling interest before it can invade a fundamental privacy right." Hill, 223 Cal. App. 3d at 1656 (emphasis added). This unqualified statement ignores the extensive body of law developed by this Court and the lower courts, holding that a "compelling need" test need not be met in all circumstances in which the privacy right is implicated.

D. When danger to health is in issue, courts have applied a rational basis test.

Indeed, in cases involving medical care, the Court has said that "when danger to health exists . . . state regulation shall be tested under the *rational basis* standard." Privitera, 23 Cal. 3d at 703 (citing Roe v. Wade, 410 U.S. 113, 163 (1973)). Under this approach, justification for the invasion of privacy will be measured by a showing that a rational basis for the action exists. The action must bear "a reasonable relationship to the

achievement of" the goal of protecting the "health and safety" of those concerned. Privitera, 23 Cal. 3d at 708-09. This requires a considerably lesser showing than that needed to meet the compelling need test.

This lower showing for health care matters was reaffirmed by the Court in Conservatorship of Valerie N., 40 Cal. 3d 143 (1985). In upholding a lower court decision that prevented sterilization of a conservatee, the Court cited Privitera while noting that "[n]o suggestion is made here that the restriction is justified because the medical procedure poses a significant danger to the health of the patient. We need not consider, therefore, whether a lesser interest would meet the constitutional imperative." Valerie N., 40 Cal. 3d at 164 n.26. The implication is clear: Not all circumstances require a showing of compelling need. Some invasions of privacy interests are justified by satisfying a lesser standard.

E. In other contexts, courts have applied a balancing approach in privacy cases without any mention of a compelling need component.

In addition to applying a rational basis test, courts have used a balancing test in several privacy amendment cases. This Court adopted this balancing approach in Valley Bank v. Superior Court, 15 Cal. 3d 652 (1975). There the Court balanced a person's right to privacy against the state interest involved. In declining to order the bank to release certain confidential information in the context of a civil suit, the Court ruled it must "indulge in a careful balancing of the right of the civil litigants to discover relevant facts, on the one hand, with the right of bank customers to maintain reasonable privacy regarding

their financial affairs, on the other." Id. at 657.

The Court followed this balancing approach in Doyle v. State Bar, 32 Cal. 3d 12 (1982). In Doyle, the Court ruled the State Bar of California did not violate the right to privacy in requiring an attorney to turn over records in connection with a disciplinary proceeding. The "privacy interest is not absolute but must be *balanced* against the need for disclosure." Id. at 20 (emphasis added). Once again the Court recognized limits to the privacy right and that the right must be weighed against other legitimate concerns.

Other courts have followed this Court's lead and applied a balancing test in a variety of factual settings in which the California constitutional right to privacy has been implicated. These include deciding whether to compel discovery of confidential medical records, Heda v. Superior Court, 225 Cal. App. 3d 525, 528 (1990) ("Defendant's privacy interests must be weighed against plaintiff's interest in obtaining trial preference."); attempts to interfere with the right to an abortion, Chico Feminist Women's Health Center v. Butte Glenn Medical Society, 557 F. Supp. 1190, 1204 (E.D. Cal. 1983) ("the court must balance the severity of the harm caused"), and most importantly in two recent decisions concerning drug testing of employees and job applicants.[4] Semore, 217 Cal. App. 3d 1087;

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[4] Lower courts are not in agreement on which standard is appropriate in the private employment setting. *See* Soroka v. Dayton Hudson Corp., 91 Daily Journal D.A.R. 13204, 13207 (Oct. 25, 1991) (compelling need required by employer for psychological testing of job applicants); Luck v. Southern Pacific Transportation Co., 218 Cal. App. 3d 1, 20 (1990) (rejects balancing approach in favor of compelling interest test in case involving drug testing of employees). But these courts did not reach the present issue of which standard applies to private, voluntary organizations.

Wilkinson, 215 Cal. App. 3d 1034.

In Semore, the court applied a "balancing test" in considering whether the discharge of an employee for refusing to consent to a random pupillary reaction eye test violated his right to privacy. Semore, 217 Cal. App. 3d at 1097. "The resolution of the dispute depends upon balancing an employee's expectations of privacy against the employer's needs to regulate the conduct of its employees at work." Id. The court did not rule on the constitutionality of the test, holding only that the trial court erred in deciding the issue on a demurrer. Id. at 1100.

Semore followed the balancing approach in workplace drug testing issues enumerated three months earlier in Wilkinson. The court in Wilkinson held constitutional a preemployment drug testing program against a challenge under the privacy amendment. "A court must engage in a balancing of interests rather than a deduction from principle to determine [privacy right] boundaries." Wilkinson, 215 Cal. App. 3d at 1046. The court said that "as long as that right is not substantially burdened or affected, justification by a compelling interest is not required. Instead, the operative question is whether the challenged conduct is reasonable." Id. at 1047.

Therefore, nothing dictates that a court apply a "compelling need" test in all privacy cases. Courts have adopted different standards depending on the parties involved and interests being protected. Because the NCAA is a private, voluntary organization whose regulatory functions do not rise to the level of state action, the test of strict scrutiny imposed by the lower courts

was inappropriate.

II. THE DETERMINATION OF WHAT STANDARD SHOULD APPLY TO THE NCAA'S DRUG TESTING PROGRAM TURNS ON THE INTEREST TO BE PROTECTED.

A. Because this issue concerns public health, the proper test for this Court to apply is the rational basis test enumerated in Privitera.

As one of the NCAA's primary functions is to protect the health of athletes, its drug testing program should be judged under the rational basis standard enumerated in Privitera.

In Privitera, the defendants were found guilty of conspiring to prescribe and sell the drug laetrile under a statute that prohibits distribution of all unapproved drugs for the alleviation or cure of cancer. Privitera, 23 Cal. 3d at 701. The statute is based on a concern that the use of such unproven drugs can lead to improper medical care and further health risk. Id. at 705-06. "If the state has the power to ban a drug with a recognized medical use because of its potential for abuse, then -- given a rational basis for doing so -- the state clearly has the power to ban a drug not recognized as effective for its intended use. Id. at 705. The issue and concern in this case is similar.

The NCAA drug-testing program also is based on substantial health concerns. (2 C.T. 129) The NCAA is concerned about improper drug use and the damaging effect it has on the health of athletes. Some of these drugs, such as cocaine and marijuana, not only are unapproved; they are illegal. Others, such as steroids, pose a serious health risk if used for other than their intended purpose or in dosages exceeding those recommended. Steroids have been linked to liver failure, tumors and a host of

other serious health problems. (2 R.T. 268:8-272:20)

The debate over the usefulness of steroids in athletic competition is comparable to the debate over the efficacy of laetrile and its benefits to cancer patients. If the state of California is allowed to justify the protections designed to ensure the health of its residents under a rational basis test, it logically follows that an organization such as the NCAA, whose purpose includes fostering healthy, clean athletic competition between college athletes, should be judged by the same standard.

Under the test established in Privitera, the inquiry is limited to deciding whether the challenged policy bears "a reasonable relationship to the achievement of the legitimate" health and safety goal. Privitera, 23 Cal. 3d at 702. The NCAA's drug testing meets this standard. The threat of drug testing can be a legitimate deterrent to drug use. O'Halloran, 679 F. Supp. at 1004. Additionally, the detection of drug use through testing can lead to needed diagnostic and therapeutic help for the athlete.

B. Alternatively, the Court should adopt the balancing test widely used by this and other courts in privacy cases.

If the Court is unwilling to adopt a rational basis standard for the NCAA's drug testing program, then it should apply a balancing test. In fact, this Court used a balancing test in another privacy case that concerned internal disciplinary action. In Doyle, the Court found the interest of the State Bar of California in conducting a disciplinary proceeding outweighed an attorney's interest in the privacy of his records. Doyle, 32 Cal. 3d at 20-21. A related issue confronts the Court in this

case. Instead of a question of disciplining an attorney, the issue is whether the interest of the NCAA in preserving the health of athletes and the integrity of its athletic competition through the disciplinary means of a drug testing program outweighs the objections on privacy grounds of any individual athlete.

Some lower courts have utilized a "reasonableness" or "balancing" test in cases concerning drug testing. *See* Wilkinson, 215 Cal. App. 3d 1034; Semore, 217 Cal. App. 3d 1087. Wilkinson and Semore differ from this case in that they concerned the rights of employees or job applicants. The right to a job is a more fundamental right than that of participating in voluntary athletic competition, yet a "reasonableness" or "balancing" approach was all the courts required to protect that right under the privacy provision. It naturally follows then that if such an approach was all that was necessary to protect employment rights, it should more than suffice in this case.

The United States Supreme Court also has adopted a balancing test for use in drug testing cases in an employment setting. *See* Skinner v. Railway Labor Executives' Ass'n., 489 U.S. 602 (1989) (upheld drug testing of railroad employees); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (upheld suspicionless drug testing of U.S. Customs Service employees). Using this balancing test, a court weighs the public interest in the testing program "against the privacy concerns implicated by the tests." Von Raab, 489 U.S. at 679. The test has its roots in the Fourth Amendment balancing approach utilized in issues involving searches and seizures. Skinner, 489 U.S. at 619.

Because this Court has applied a balancing test in cases involving the right to privacy and because the United States Supreme Court has adopted a balancing test for use in drug test cases, a balancing approach is a proper test to apply to the NCAA's drug testing program.

One federal court already has ruled that the NCAA program satisfies a balancing test. O'Halloran, 679 F. Supp. at 1000. The court concluded "the larger interests of the health of the student-athlete as well as the public's and the competing athletes' perception of the fairness of intercollegiate athletics greatly outweighs the relatively small compromise of an individual's privacy interest, which is diminished in the context of collegiate athletics." Id. at 1007.

Similar diminished expectations of privacy were a critical factor in tipping the balancing test in Skinner in favor of upholding the drug testing program. The Court found the tests posed "only limited threats to the justifiable expectations of privacy." Skinner, 489 U.S. at 628. *See also* Miller v. Murphy, 143 Cal. App. 3d 337, 343-44 (1983) ("Some constitutional restrictions, even though identified with the right to privacy, are deserving of less than strict scrutiny because of their *minimal intrusion* into a person's privacy.") (emphasis added) (upholding local ordinances requiring pawnbrokers to obtain customers' fingerprints).

1. Because privacy expectations are diminished in the context of athletics, the NCAA drug testing program constitutes a "minimal intrusion" into the privacy rights of college athletes.

The conditions under which college athletes compete and

train substantially diminish their expectations of privacy in connection with athletic competition. Athletes routinely submit to physical examinations and thus "reasonably should expect effective inquiry into their fitness and probity." Von Raab, 489 U.S. at 672. They frequently undress around teammates in an open locker room setting. They urinate in shared lavatory facilities. (2 R.T. 402:26-403:26). Under these conditions random drug testing is a reasonable intrusion into their privacy. *See* O'Halloran, 679 F. Supp. at 1005; Schaill by Kross v. Tippecanoe County School Corp., 864 F.2d 1309, 1318 (7th Cir. 1988) (upholding drug testing program for high school athletes against constitutional privacy attack).

The history of drug testing in sports further diminishes the privacy expectation of college athletes. Drug testing is mandatory in Olympic sports. The NCAA program is modeled after those conducted by United States and International Olympic committees. Hill, 223 Cal. App. 3d at 1648. In light of the experience and practice of these athletic organizations, the respondents should not have expected to be exempt from compliance when the NCAA instituted a similar program.

2. The interest of the NCAA in providing clean, equitable competition and protecting the health and safety of student-athletes outweighs the privacy interests of individual participants.

The NCAA has a legitimate concern about drug use in sports. The respondents contend that the NCAA has overstated this problem, but the United States Supreme Court has declared "there can be no doubt that drug abuse is one of the most serious problems confronting our society today." Von Raab, 489 U.S. at

674. The Court also observed "[t]here is little reason to believe that American workplaces are immune from this pervasive social problem." Id. The same is true of collegiate sports.

The first school year of NCAA drug testing resulted in thirty-four athletes ruled ineligible, the second year twenty-one. Hill, 223 Cal. App. 3d at 1660-61. But these results are not conclusive as to the amount of drug use by college athletes. A survey conducted for the NCAA in 1984 showed widespread use of several drugs on the NCAA banned list. (2 C.T. 105-126) According to the survey, 36% of college athletes had used marijuana or hashish within one year of the survey date, 31% had used anti-inflamatories, 28% major pain medication, 17% cocaine, 8% amphetamines, 4% psychedelics, and 2% barbiturates or tranquilizers. (2 C.T. 125)

The respondents would have the Court believe that the lack of more positive tests is proof drug use among college athletes is minimal. But a better conclusion is that the lack of more positives is proof of the program's success. The court in O'Halloran recognized this likely result by observing the testing will "have a deterrent effect, and that over time less evidence [of drug use] will be found." O'Halloran, 679 F. Supp. at 1004.

Nor should the relatively low number of positive drug tests render a drug testing program unnecessary. "Such evidence of the program's success should not be used to demonstrate lack of need for the program or that the program has no reasonable basis." Id. "The mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program's validity." Von Raab, 489 U.S. at 674. "When the

Government's interest lies in deterring highly hazardous conduct, a low incidence of such conduct, far from impugning the validity of the scheme for implementing this interest, is more logically viewed as a hallmark of success." Id. at 675-76 n.3.

The NCAA also has a significant interest in sponsoring competitions that are untainted by drug use. Drug-free competitors ensure that NCAA events are fair, honest and clean. The integrity of the NCAA and value of its sponsored events would be seriously impaired by any taint from drugs. More importantly, the NCAA must ensure that only healthy athletes are placed into competition. An organization sponsoring athletic events would not be fulfilling its responsibilities if it allowed unhealthy athletes to compete.

Having established the NCAA has a need for its drug testing program, the Court must next consider whether the procedures used by the NCAA adequately protect privacy rights. The lower courts concluded that the NCAA program interfered with an athlete's "right to keep medical confidentiality" and might keep athletes from "taking a needed medication for fear that it will result in a positive drug test." Hill, 223 Cal. App. 3d at 1666, 1668. Such fears are groundless because the NCAA will not punish those who declare before testing that they have a documented medical need for some of the drugs that are included on the banned list. (2 C.T. 130)

Drug testing is part of a medical program designed by the NCAA to ensure the health of its competing athletes. (2 C.T. 129) Some intrusion into privacy is a necessary component of almost all forms of medical care. The United States Supreme

Court acknowledged this in upholding a New York law requiring disclosure to the state of patient use of some prescription drugs. Recognizing there are a "host" of "unpleasant invasions of privacy that are associated with many facets of health care," the Court said "[n]evertheless, disclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient." Whalen v. Roe, 429 U.S. 589, 602 (1977).

In this regard, the NCAA has taken precautions to ensure that whatever disclosures of medical history required of the athlete be treated with confidentiality. Only if an athlete's "A" sample of urine tests positive for a prohibited substance will laboratory personnel inform the NCAA of any information on an athlete's declaration form that might indicate that a medical condition or declared drug might account for the positive result (2 C.T. 136) Otherwise the samples are identified only by a secret code. (2 C.T. 135) No athlete or school names are supposed to be attached to the urine samples.

Program provisions that appear most intrusive into privacy rights are actually the procedures most crucial in guaranteeing athletes receive accurate test results. Monitoring of the athlete while producing a sample is critical to this end. This procedure diminishes the possibility of an incorrect result by assuring that the sample tested belongs to the athlete. "[V]isual . . . monitoring of the act of urination" might be required as part of a drug testing program and because of "the

desirability of such a procedure to ensure the integrity of the sample." Skinner, 489 U.S. at 617, 626. Still, the NCAA has tried to honor individual privacy concerns by conducting the monitoring as discretely as possible. In the case of the respondent, Barry McKeever, the monitor stood behind him and did not directly observe him produce a sample. (2 R.T. 389:24-391:2)

The need for the drug testing program and the safeguards taken by the NCAA to ensure its integrity must be balanced against the diminished privacy expectations of the student athletes and the nature of the interest being protected.

The chance to play college football, soccer or any other sport is not a fundamental right. "It is certainly relevant to the ultimate question of constitutionality . . . that the activity to which random testing is attached is participating in an extracurricular activity. Random testing is not . . . a condition of a weightier benefit such as employment or school attendance." Schaill by Kross, 864 F.2d at 1313.

The NCAA has met the balancing test by showing that the interest of any individual student in voluntarily participating in intercollegiate competition does not outweigh the NCAA's substantial interest in protecting the health and safety of student-athletes and the integrity of competition through its drug testing program.

III. EVEN IF THE STRINGENT BAGLEY TEST APPLIES, THE APPELLATE COURT ERRED IN ITS APPLICATION BECAUSE THE NCAA MET ITS BURDEN OF PROOF AT TRIAL.

Contrary to the conclusion of the lower courts, the NCAA drug testing program is constitutional because it meets the requirements of the Bagley test.

Under this test, the NCAA was required to show that: "(1) the testing program relates to the purposes of the NCAA regulation which confer the benefit (participation in intercollegiate competition); (2) the utility of imposing the program manifestly outweighs any resulting impairment of the constitutional right; and (3) there are no less offensive alternatives." Hill, 223 Cal. App. 3d at 1656-57 (citations omitted).

A. The NCAA met the first prong of the Bagley test by proving that the purpose of its drug testing program is related to its regulatory goals of preserving the health of athletes and the integrity of its athletic competition.

The NCAA is a private, voluntary organization that sponsors intercollegiate athletic competition. In order to ensure the fairness of such competition the NCAA instituted its drug testing program "[s]o that no one participant might have an artificially induced advantage, so that no one participant might be pressured to use chemical substances in order to remain competitive and to safeguard the health and safety of participants." (2 C.T. 129) These goals all relate to the NCAA's stated purpose.

The appellate court ruled that the program conducted by the NCAA did not meet these goals because the program itself was flawed. Hill, 223 Cal. App. 3d at 1657-65, 1675. A sampling of the court's findings shows that its conclusions are not supported by the evidence.

The court found, for example, that because the NCAA uses three different laboratories, results between the three could vary. Id. at 1664. But in doing so, the lower court ignored evidence that all labs must be approved by the NCAA and are

subject to "periodic quality check[s]" to ensure compliance with NCAA standards. (2 C.T. 134)

The court also incorrectly concluded that "[a]ll evidence taken together demonstrated that there was no drug involvement in any sport except football, and that the problem related only to steroid use and involved a small minority of football players." Hill, 223 Cal. App. 3d at 1662. This conclusion is in direct conflict with undisputed testimony. Of the fifty-five players declared ineligible in the first two years of the drug testing program, all but three were football players and thirty-two of those were declared ineligible for steroid use. Id. at 1660-61. But that does not mean there was no involvement in any other sport or that no drugs other than steroids were involved. In fact, fourteen players were ineligible because of positive results for street drugs such as cocaine and marijuana. Id. at 1661.

The court also failed to note that the primary reason the drug problem appears limited to football is because the vast majority of athletes subjected to drug testing were football players. In 1987-88, for example, 1,425 of the 1,589 (89.7%) athletes tested were football players. Id. With such an emphasis on testing participants in one sport played entirely by men, the court should not have found so significant the finding that no female athletes tested positive. Id. at 1660.

The court took this lack of positives to conclude that drug use is not a problem in college sports. In so doing it completely ignored the better explanation that the testing had the desired deterrent effect. *See* O'Halloran, 679 F. Supp. at

1004.

Such incorrect interpretations of the drug testing data and procedures led the lower courts to erroneously conclude the NCAA drug testing program does not relate to its regulatory goals. A correct reading of the data demonstrates there is drug use among college athletes and that the NCAA's testing procedures are valid. On the basis of this evidence the conclusion is inescapable that as the drug testing program is related to the NCAA's goals of ensuring the health of athletes and integrity of competition, the first prong of the Bagley test was met.

B. By showing there is a compelling need for the drug testing program, the NCAA satisfied the second prong of the Bagley test.

The NCAA has a compelling interest in protecting the health and safety of its athletes and ensuring fair athletic competition. The appellate court either ignored or casually dismissed the NCAA's arguments in this area when it erroneously concluded that it failed to meet the second prong of the Bagley test.

Uncontroverted evidence was presented that all drugs on the NCAA banned list are harmful if misused. Hill, 223 Cal. App. 3d at 1668. The lower courts trivialized this finding by noting "[a]spirin and even water can be dangerous if misused." Id. But the NCAA is not concerned about the use of aspirin and water. Its list of banned drugs includes such illegal street drugs as cocaine, marijuana and heroin, in addition to other substances "purported to be performance enhancing and/or potentially harmful to the health and safety of the student-athlete." (2 C.T. 129) Testimony from the respondent's own expert witness, Dr. David T.

Lowenthal, identified drugs on the banned list as having the potential to cause testicular atrophy, liver damage, tumors, adverse reactions on the cardiovascular system such as arrhythmias, hair growth, acne, and host of other side effects, many which were identified as irreversible. (2 R.T. 267:25-287:26) While it is true that some of the banned compounds can be found in common over-the-counter remedies, this should not be cause to invalidate the program. The NCAA is not trying to halt the therapeutic use of such substances. Athletes whose declared use of these substances is consistent with their test result are not subject to disciplinary action. (1 R.T. 38:1-39:7) Under this procedure, the appellate court's concern that "[b]anning so many useful medications may actually be harmful to the health and safety of the athletes who are likely to be afraid of taking a needed medication for fear that it will result in a positive drug test" is groundless. Hill, 223 Cal. App. 3d at 1668. The NCAA is not out to punish therapeutic use of such medications; its purpose is to stop the abuse of these substances.

The NCAA presented evidence that many of the banned substances can affect athletic competition. Some of these drugs can enhance athletic competition, while others were shown to hinder performance. Either way the ability to conduct fair competition is affected. The lower court was preoccupied with a concern for deciding which drugs might be performance enhancing and which might not while ignoring the conclusion that any improper drug use can have an adverse affect on the integrity of athletic competition and the health of athletes.

The appellate court also questioned the failure of the

program to test for alcohol use or ban smoking. Id. at 1668-69. This criticism is irrelevant. See Lovvorn v. City of Chattanooga, 846 F.2d 1539, 1544 (6th Cir. 1988) (argument that urinalysis unconstitutional because alcohol abuse problems not addressed "cloud[s] the complainant's true criticisms of drug testing," since "problems of underinclusiveness are rarely problems of constitutional magnitude unless they signify impermissible discriminatory motives").

The NCAA program is a necessary and tempered response to the problems of drug abuse in sports and society. Through this program the NCAA attempts to ensure fair competition and the health and safety of the its athletes. The importance of these goals outweigh the minimal intrusion of privacy required for their attainment. This is particularly true with athletes, whose expectation of privacy is diminished by the communal nature of the locker room and the need for regular physical examinations. In showing that there is a compelling need for its drug testing program, the NCAA met the second prong of the Bagley test.

C. The final prong of the Bagley test was met by the NCAA at trial when ample evidence was presented that there is no viable alternative to the drug testing program.

Drug testing is the best method for the NCAA to achieve its regulatory goal. The appellate court points to drug education as a more economical and effective means of combating the drug abuse problem. Hill, 223 Cal. App. 3d at 1673. But no evidence was presented in this regard. It merely is the supposition of the respondent converted into findings of fact. The court has substituted its beliefs for the judgment of a distinguished group of drug education and drug testing experts assembled by the NCAA

to implement its drug testing program. (2 C.T. 92)

Much study went into the creation of this program. The result reflects the collective judgment of the NCAA staff, its member schools, and worldwide recognized experts in the field of drugs in sports. (2 C.T. 92-104)

Those experts, such as Dr. Dan Hanley, a member of the NCAA drug testing committee who has a thirty-one-year involvement in international sports, are convinced that testing programs such as those conducted by the NCAA are the best way to combat drug abuse:

> I have watched them use regulations, inspection of luggage, inspection of quarters, education, brochures, posters, speeches. It's my firm belief that if you're going to control drugs in sport, you've got to do testing and you've got to do good testing under a strict protocol where the athlete is protected.

(1 R.T. 47:23-48:4) To conduct a program without the procedural safeguards recommended by the experts, such as monitoring of the sample production, would subject the athletes to an increased risk of error and unwarranted suspicion. Moreover, the opportunity for athletes to cheat would decrease the NCAA's ability to assist students suffering from drug abuse and diminish the program's deterrent effect. (Supp. R.T. 1)

In showing that there are no viable alternatives to drug testing in meeting its regulatory goals, the NCAA satisfied the final prong of the Bagley test.

CONCLUSION

At a time when an authority as mighty as the United States Supreme Court calls drug abuse "one of the most serious problems confronting our society today," Von Raab, 489 U.S. at 674, the drug testing program of the NCAA is the most modern means

available to deter the use of drugs in sports. The program poses a minimal intrusion into the privacy rights of the athletes while meeting the mission of the NCAA to protect the health and safety of its student athletes while ensuring the integrity of intercollegiate competition.

The petitioner prays that the Court vacate the permanent injunction prohibiting it from conducting its drug testing program at Stanford University.

Dated: November 5, 1991.

Respectfully submitted,

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